Supreme Court, U.S.
FILED
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(4)

No. 00-0513

IN THE

Supreme Court of the United States

LEVI STRAUSS & CO.,

Petitioner,

v.

AGUSTINA TREVIÑO, HERMINIA HERRERA,
BEATRIZ OLIVAREZ AND GLORIA GUAJARDO,

Respondents.

On Petition for Writ of Certiorari from the
United States Court of Appeals for the Fifth Circuit

PETITIONER'S REPLY BRIEF

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Preliminary Statement

Respondents' Brief in Opposition makes a gallant effort to try and explain away the Fifth Circuit's erroneous ruling in *Treviño*; especially the conflict it has created among the circuit courts. Their effort fails, however, because *Treviño* is, as Petitioner has stated in its opening brief, an erroneous and inconsistent decision that should be reversed. Interestingly, Respondents' Brief in Opposition also fails to address significant points in the petition. This reply brief will address the glaring errors in Respondents' brief and in doing so, further support the decision to grant the Petition for Writ of Certiorari in this case.

Argument

I. The Fifth Circuit Erroneously Concluded That a Workers' Compensation Discrimination Claim "Arises Under" the State's Workers' Compensation Laws and Is Therefore Barred from Removal by § 1445(c).

A. Respondents' Assertion That the Treviño Decision Does Not Conflict with Decisions From the Sixth and Seventh Circuits is Incorrect.

Contrary to the Fifth Circuit's decision in this case, both the Sixth and Seventh Circuit Courts of Appeals, have held that workers' compensation retaliation claims do not arise under the applicable state workers' compensation laws. *See Thornton v. Denny's, Inc.*, No. 92-1368, 1993 WL 137078 (6th Cir., Apr. 29, 1993) and *Spearman v. Exxon Coal USA, Inc.*, 16 F.3d 722 (7th Cir. 1994), *cert. denied*, 513 U.S. 955 (1994). In their Brief, Respondents argue that the Fifth Circuit's decision in *Treviño* does not conflict with these decisions because they "involve those few states where workers' compensation retaliation claims arise under the common law, not statute, and constitute an independent tort." Respondents' Brief at pp. 8-10. Respondents' argument is simply incorrect.

1. Sixth Circuit

In *Thornton*, the workers' compensation retaliation cause of action at issue was statutorily based. In 1985, Michigan added § 418.301 to the Michigan Workers' Compensation Disability Act, thereby creating a statutory cause of action for retaliatory discharge. The specific statutory language provides, in pertinent part:

> A person shall not discharge an employee or in any manner discriminate against an employee because the employee filed a complaint or instituted or caused to be instituted a proceeding under this act or because of the exercise by the employee on behalf of himself or herself or others of a right afforded by this act.

Mich. Comp. Laws Ann. § 418.301(11) (West 2000). Additionally, Michigan courts have specifically recognized that this retaliatory discharge cause of action is statutorily created. In *Phillips v. Butterball Farms Co., Inc.*, 531 N.W.2d 144, (Mich. 1995), the Michigan Supreme Court recognized that:

> A claim for retaliatory discharge under the WDCA is **statutorily provided** . . . Thus, a **statutory duty** is created on the part of the employer not to discharge an employee in retaliation for the employee's filing of a workers' compensation claim.

(Emphasis added) Id. at 147 n.17. The court went on to note that, "this right against retaliatory discharge does not stem from any term agreed upon by the contracting parties, but from public policy now expressed in a statute." *Id.* at 147. *See also, Dunbar v. Department of Mental Health*, 495 N.W.2d 152, 156-57 (Mich. Ct. App. 1992) ("A claim for retaliatory discharge under the WDCA is statutorily provided . . . Thus, a statutory duty is created on the part of the employer not to discharge an employee in retaliation for the employee's filing of a workers' compensation claim."). As is readily apparent, the workers' compensation retaliation cause of action in *Thornton* was in fact statutory.

2. Seventh Circuit

In *Spearman*, the Seventh Circuit considered a workers' compensation retaliation claim under Illinois law. At that time, the Illinois workers' compensation law contained a statutory prohibition of workers' compensation retaliation, but provided no civil remedy. The statute provided in part:

> It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of the exercise of his or her rights or remedies granted to him or her by this Act.

820 Ill. Comp. Stat. Ann. 305/4(h) (West 2000). While the language in the statute did not expressly provide a private right of action, the Illinois Supreme Court determined that such an action existed, noting that, "where a statute is enacted for the benefit of a particular class of individuals a violation of its terms may result in civil as well as criminal liability, even though the former remedy is not specifically mentioned." *Kelsay v. Motorola*, 384 N.E.2d 353, 359 (Ill. 1978).

This cause of action has come to be known as the *Kelsay* tort in the state of Illinois. Although the elements of this cause of action and the damages recoverable have developed through case law over several years, the basic employer prohibition on retaliation is contained in the Illinois workers' compensation statute. Moreover, in *Spearman*, the Seventh Circuit explicitly recognized that its holding conflicted with the Fifth Circuit on this issue: "[t]he fifth circuit has since gone into conflict with [the Seventh Circuit], although it does not appear to have recognized that it was doing so." *Spearman*, 16 F.3d at 723.

Further, even if the cause of action in *Spearman* was completely common law with absolutely no statutory basis, this would not change the fact that the circuits are in conflict over this issue. Whether a workers' compensation retaliation cause of action is created by statute or common law, is not determinative of whether it "arises under" the workers' compensation laws for purposes of 28 U.S.C. § 1445(c). The statutory versus common law distinction is a difference without substance because the two causes of action have the same purpose of protecting employees who have been injured on the job, require essentially the same proof to prevail on a cause of action and provide essentially the same remedies. Workers' compensation retaliation claims in both Michigan and Illinois are nearly identical to workers' compensation retaliation claims in Texas. Accordingly, there is no principled basis for holding that a claim in Texas "arises under" the workers' compensation law while a nearly identical claim in Michigan or Illinois does not.

Finally, as the Petition for Certiorari points out, the legislative history of § 1445(c) clearly establishes that in enacting the statute, Congress was concerned with workers' compensation **benefit** claims, not discrimination claims. Petition of Certiorari at pp. 8-9. Respondents' complete failure to address this point in their Brief is a tacit admission, that when § 1445(c) was adopted, it was not intended to cover workers' compensation discrimination claims arising under statutes like Texas Labor Code § 451.001.

II. The Fifth Circuit Has Established an Impermissible Per Se Rule That Workers' Compensation Discrimination Claims Can Never Be Preempted by § 301.

A. Respondents Are Wrong in Their Assertion that the Fifth Circuit Spent a Significant Amount of Time Presenting and Discussing the Underlying Claims.

The facts surrounding Respondents' terminations are undisputed; specifically, Respondents Guajardo, Herrera and Olivarez failed to renew their leaves of absence while Respondent Trevino was unable to return to work from her leave of absence after 12 months. It is also undisputed that the Respondents' employment was governed by a CBA in effect at the time and that the CBA contained detailed provisions regarding leaves of absences, the process and time period involved in renewing such leaves and the maximum amount of time an employee could be off work on leave. Yet nowhere in the Fifth Circuit's opinion is there any discussion regarding these facts or how Respondents' terminations would or would not involve an interpretation of the CBA. Instead, the Court simply concluded that workers' compensation claims by their nature, can never be preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a). This per se rule is in direct conflict with a line of cases from this Court which have addressed and recognized the preemptive effect of § 301.

B. There is no Factual or Legal Basis to Respondents' Assertion that Their Claims Arise Independent of the Provisions of the CBA.

Respondents make a concerted effort to avoid the preemptive affect of § 301 by alleging that their "claims arise

independent of the provisions of the CBA." In fact, they claim that they "never invoked any provision of the CBA in their Petition, and neither was the CBA cited at any point in support of the Respondents' claims." Respondents' Brief at p. 11. These assertions are simply not true.

First, it is well settled that Respondents cannot avoid the grievance and arbitration procedure of a CBA by artful pleading. *See e.g., IBEW v. Hechler*, 481 U.S. 851, 859 n. 3 (1987) ("when a state law claim is substantially dependent on analysis of a collective bargaining agreement, a plaintiff may not evade the pre-emptive force of Section 301 . . . by casting the suit as a state-law claim."); *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 210-11 (1985) (question involving interpretation and application of CBA must be made by reference to federal law, whether questions arise in context of suit for breach of contract or in suit alleging liability in tort; "[a]ny other result would elevate form over substance and allow the parties to evade the requirements of § 301 by relabeling their contract claims as claims for tortious breach of contract").

Moreover, in this case, Respondents not only expressly invoked the CBA in their deposition testimony, but they did so in their Fifth Circuit Brief.

1. Respondents' Deposition Testimony.[1]

- **Augustina Treviño:** She was terminated pursuant to Article XI § 1 of the CBA because she exceeded the maximum leave period of 12 months. She claims that the CBA provision limiting LOA's to 12 months is unfair to injured employees and thus discriminates against them, thereby

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[1] Relevant excerpts from Respondents' deposition testimony are attached at Appendix A.

requiring interpretation of the CBA because her termination was unquestionably taken in accordance with the provisions of the CBA. Trevino Dep. at 106:23-107:4. She also claims that LS&CO. discriminated against her by not giving her light duty or accommodating her under art. V § 8 of the CBA. *Id.* at 89:11-18, 109:3-22.

- **Gloria Guajardo:** She claims that her termination violated art. XI § 1 of the CBA (requiring employees to renew their LOA's every 30 days) because the doctor's letter she submitted to renew her LOA should have put LS&CO. on notice that she would be unable to return to work at the end of the 30-day period. Guajardo Dep. at 106:25-108:1; 117:20-118:12; 136:1-4. Her claim thus turns on the correct interpretation of art. XI § 1--does it require an employee to renew her 30-day LOA when it expires, or can a doctor's letter indefinitely extend a LOA beyond the 30-day period specified in the CBA? Guajardo also claims that LS&CO. violated its light duty policy and art. V § 8 of the CBA, which governs accommodations. *Id.* at 136:9-16; 138:6-14.

- **Herminia Herrera:** Herrera, who was terminated after she failed to provide a properly dated doctor's letter that specified the expected dates for her return, claims that LS&CO. discriminated against her by "the way" it "enforced . . . and interpreted [the LOA] policy." Herrera Dep. at 145:21-146:4. Her claim requires interpretation of art. XI § 2 of the CBA, to determine whether her LOA request complied with the CBA requirements that "requests for leave must be in writing" and that the "Company may require proof of evidence of illness, including a doctor's certificate." Herrera also claims that LS&CO. should have accommodated her, *Id.* at 155:6-20, thereby requiring interpretation of art. V § 8 of the CBA.

- **Beatriz Olivarez:** Olivarez was terminated after she failed to renew an 8-day LOA. Her § 451 claim is based on her interpretation of the CBA that all LOA's are 30 days in length. Olivarez Dep. at 107:5-111:6; 113:5-25. This requires interpretation of art. XI § 1 of the CBA, which permits LOA's "upon written request **not to exceed thirty (30) days.**" (emphasis added).

2. *Respondents' Fifth Circuit Brief.*[2]

Respondents' Fifth Circuit brief is replete with claims that Plaintiffs' terminations either violated or require interpretation of the CBA. *E.g.*: p. 20 (claiming that Respondents' terminations violated art. XI § 4 of the CBA ("return rights"), that LS&CO. misinterpreted CBA provision, and Plaintiffs' "interpretation" is correct one); p. 21 n.6 (claiming LS&CO. violated CBA's accommodation provision); p. 10 (contending that in extending Olivarez' LOA for 8 days (as she requested), LS&CO. "failed to extend Ms. Olivarez the **customary 30 days**" (emphasis added), thereby requiring interpretation of art. XI § 1, which permits LOAs "not to exceed thirty (30) days"); p. 11 (challenging Guajardo's termination because she "submitted a doctor's note which she believed satisfied the leave of absence extension requirements," thereby requiring interpretation of art. XI § 2, which specifies LOA extension prerequisites); pp. 7, 12 (challenging Petitioner's interpretation of the LOA provision in the CBA); p. 24 (claiming that *Treviño* "raised a fact issue as to whether LS&CO. violated its own absence policy in refusing to return her to a position other than her former job"); and pp. 7, 26 (contending that Petitioner violated the light duty policy in the CBA).

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[2] Relevant excerpts from Respondents' Fifth Circuit Brief are attached at Appendix B.

Conclusion

This Court should grant the Petition for Writ of Certiorari because *Treviño* not only decides an important question of federal law but also conflicts with the decisions of this Court as well as other Circuit Courts of Appeals.

Respectfully submitted,

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APPENDIX

APPENDIX

Relevant Excerpts From Respondents' Deposition Testimony

A. Augustina Trevino

Q: And you also thought it was discrimination against you when they wouldn't give you light duty a year later, right?

A: When they were firing me and they weren't giving me an opportunity.

Q: So the answer is yes?

. . .

A: Yes.

. . .

Q: Is it your belief, Mrs. Treviño, that having a 12-month time limit on leave of absence was unfair to people with on-the-job injuries?

. . . .

A: Yes, I think so.

. . .

Q: Were you aware that Levi had a special program to provide a special job assignment in certain situations?

A: No.

Q: I will represent to you, Mrs. Trevino, that Exhibit No. 18 is Levi Strauss's accommodations policy which was in force at the time of you termination.

. . .

Q: Do you think that Levi should have considered you for this type of special job assignment?

A: I think so.

Augustina Trevino Deposition at pp. 89:11-18; 106:23-107:4; 109:3-22.

B. Gloria Guajardo

Q: . . . Are you saying that Levi knew as of June 4, 1994 that you couldn't work?

A: Yes, they knew.

Q: And that's because you had given them the medical excuse from Dr. Sanchez, correct?

A: Yes.

. . . .

Q: Do you understand that Levi says they terminated you because you did not comply with the leave of absence policy?

. . . .

A: Well, I was not ready to work yet.

Q: So are you saying that you had complied with the policy?

A: Yes.

Q: Because you had told them that you still couldn't work on that date?

A: It wasn't what I was saying but what the doctor was saying, the evaluation that he did.

. . . .

Q: Doesn't Mr. Ramos's letter [of May 25, 1994], which is Exhibit No. 8, say in the second paragraph that . . . in his opinion, you had not contacted them to extend your leave of absence?

. . . .

A: Well, yes, because he mentioned that there.

Q: You disagreed with that, didn't you? You thought that you had complied with the policy; isn't that right?

A: Yes.

Q: You thought that you had already requested an extension of your leave of absence; isn't that right?

A: Well, yes, because they had already had with them all of that information from the doctor.

. . . .

Q: So you thought the policy [requiring a written LOA request] was unfair, correct?

A: Well, not unfair, but I thought that what I had turned in was correct, was in accordance with what the policy required.

Q: . . . Do you believe that Levi Strauss . . . should have tried to find you light duty or modified duty job instead of terminating you in June of 1994?

A: Yes.

Q: And because Levi didn't do that, do you think they discriminated against you?

A: Yes.

. . . .

Q: Do you think Levi should have found a different job for you instead of terminating you?

. . . .

A: Yes.

Q: That they should have given you special consideration because you had a serious injury and had been a long-time employee?

. . . .

A: Yes.

Gloria Guajardo Deposition at pp. 106:25-108:1; 117:20-118:12; 136:1-4; 136:9-16; 138:6-14.

C. Herminia Herrera

Q: Well, do you think that the way they enforced this policy and interpreted this policy was part of the discrimination and harassment that you're complaining about?

. . . .

A: Yes.

. . .

Q: Instead of terminating your employment in January, what do you think Levi's should have done for you?

. . .

A: Help me out. Try me out at another position. Train me. I don't know, performing another type of work. Somehow I believe that they should have helped me out.

Q: So do you think they should have given you some special consideration and found another type of work for you?

. . .

A: Yes.

Herminia Herrera Deposition at pp. 145:21-146:4; 155:6-20.

D. Beatriz Olivarez

Q: And what date are you referring to?

. . .

A: 4-20-95. He had asked Alma Martinez on one occasion - - Alma Martinez, and Alma Martinez said, yes, to tell me and to mark it in a calendar that every 30 days to be current.

Q: Every 20 days or every 30 days?

A: No, that it would expire on the 20th, which equaled to 30 days.

Q: It's your understanding that that's what Alma told your husband?

A: Yes.

Q: That you had to extend every 30 days on the 20th of the month?

A: Yes.

Q: So were you going to extend again on May 20 ,1995? Is that when you were going to extend?

A: Well, not exactly on the 20th because it was on a weekend, and the paper expired on the 20th. It could be the day before or the day after.

. . .

A: But I would try for it to be before the 20th so I wouldn't have any problems.

Q: So you thought you had to renew on the 20th of each month; is that what you're saying?

. . .

A: Yes, because I was operated on on the 13th of March, and that's when Jorge Suarez called me, and he told me that I had missed some days for the extension and that they wanted to terminate me. That was in March. They operated on me on the 13th of March. That was on a Monday, and Jorge called me approximately on a Friday. And I couldn't move or anything, so my husband went to Dr. Pechero and got the letter for the 30-day extension, which was on the 20th or March. From there, Dr. Pechero, he took it directly to Levi's, gave it to Alma Martinez. Alma Martinez to him, "Tell her that that's the date it's going to be expiring, not to forget the 20th which equals, you know, the 30 days.

So my husband also asked Jorge Suarez, and Jorge Suarez told him the same thing, that it was every 30 days, and if I had taken it in on the 20th, so the next letter was going to be April 20th, and that's how I was basing myself and keeping current with the 30-day extension.

Q: After you husband got this extension for you on April 20, 1995, did you make a note somewhere to extend it on May 20, '95?

. . .

A: I wrote it on a calendar, that it had to be on the 20th day of each month.

Q: Did your husband tell you that your extension was going to expire on April 20, 1995?

A: No, because he had taken it on the 20th, and it couldn't expire in eight more days because if it's 30 days, it can't expire on the 28th.

Q: Are you saying your husband didn't know it was going to expire on April 28, 1995?

. . .

A: We knew that it would expire April 20th and we would have to take the extension in 30 days.

Q: When did you think you had to take another extension?

. . .

A: Every 30 days.

. . .

Q: And your leave of absence expired on February 28, 1995, didn't it?

. . .

A: The document was going to expire on the 20th of each month, which was the 30-day extension.

Q: Is it your understanding that your leave of absence expired on April 28, 1995, yes or no?

. . .

A: I understand that it expires on the 20th of each month, which is the 30-day, because I don't think it could have expired on the 28th. I think it was the 20th, and then eight days later.

Beatriz Olivarez Deposition at pp. 107:5-111:6; 113:5-25.

APPENDIX

Relevant Excerpts From
Respondents' Fifth Circuit Brief

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The summary judgment evidence also showed that Levi regularly failed to follow its own policies and procedures . . . The evidence likewise showed that Levi . . . terminated at least one Appellant (Agustina Trevino) on the ground that she was unable to perform the essential functions of her *former* job, **despite the fact that its Leave of Absence policy clearly contemplated the returning post-90 day absentees to positions of employment *other* than their former jobs** and that, in conformity with that provision, Levi had a policy of checking to see whether light duty work was available for employees who could *not* return to their former positions of employment.

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Ms. Olivarez was finally allowed to commence her leave of absence on January 19, 1995, and received three extensions (every thirty days on the 20th of the month) through April 28, 1995. CRR 1460. Her final extension was requested on April 20, 1995 but Flora Weaver, the Human Resources Assistant signing the LOA form, **failed to extend Ms. Olivarez the customary thirty days,** instead extending it only until April 28, 1995.

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Finally, on August 26, 1993, Ms. Guajardo was granted a leave of absence and was granted extensions through May 5, 1994,

CRR 1504, **when she submitted a doctor's note which she believed satisfied the leave of absence extension requirements**. CRR 1472-1475. Levi disagreed and notified her by letter dated June 6, 1994, that she had been terminated effective May 28, 1994 for failing to comply with the leave of absence extension requirements. CRR 1503.

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Contrary to the Magistrate's holding in this regard, however, **the summary judgment evidence revealed that the Leave of Absence policy did *not* require absent employees to return to their *former* jobs**, that other jobs were available, and that Levi had repeatedly failed to follow its own policies relating to the handling of the Appellants' injuries and claims, had repeatedly denigrated the Appellants' injuries and physical conditions, had falsely claimed that the reason for Appellant Trevino's discharge was that she, and not Levi, had violated the Leave of Absence policy . . .

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In the instant case, Levi's Leave of Absence policy clearly contemplated that employees returning to work after 90 days (but within 12 months of the commencement of their absence) would be given available positions of employment *other* than their former jobs. CRR 41-42, 73-74, 98. In setting forth those positions of employment to which employees were to be returned upon returning to work, **Article XI, Section 4 of Levi's Collective Bargaining Agreement specifically provided that: "an employee granted a leave of absence under this Article shall [only] be returned *to his machine* if he returns within 30 calendar**

days, and *to his same job if he returns within 90 calendar days.*" CRR 41-42, 73-74, 98.[5]

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The policy thus unmistakably contemplated returning post-90 day absentees to positions *other* than their former jobs. CRR 41-42, 73-74. Had the policy only contemplated returning employees to their *former* jobs, as Levi contends, it could not have at the same time *restricted* their right to return thereto after 90 days without effectively reducing the 12 month leave maximum to a 90 day maximum.

An interpretation of the policy to require post-90 day absentees to resume their former jobs would thus render the 90 day guarantee meaningless, and violate the settled rule that a court must adopt that interpretation which affords some consequence to each part of a contract. Chapman v. Orange Rice Mill Co., 747 F.2d 981, 983 (5th Cir. 1984); Coker v. Coker, 650 S.W.2d 391, 394 (Tex. 1983).[6]

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[5] **Although there were two Collective Bargaining Agreements that covered the periods involved in this lawsuit**--one covering January 27, 1992 until January 27, 1995, CRR 58-91, which provided that absences beyond 12 months resulted in "inactive status," CRR 74, and the other covering January 27, 1995 until January 27, 1996, CRR 23-56, which Levi claims resulted in automatic termination, CRR 41-42--the agreements were similar with regard to the status of employees returning within 30 and 90 days of injury and prior to the expiration of twelve months. See, **Return Rights" sections of the Agreements**. CRR 41, 74.

[6] **The policy further required that, before termination, "the parties hereto shall meet and discuss what, if any, *special* job assignment consideration such employee may need,"** CRR 47-48, 79, Ramos Depo., pp. 73-75. No such meetings, however, took place in the instant case. Appellants Guajardo, Olivarez and Trevino's attempts to hold

(continued...)

Nevertheless, when Agustina Trevino sought to return to work within the allotted 12 months she was refused that opportunity solely because she was not considered fit to perform the essential functions of her *former* job, to wit: "[a]t the time of her termination, [Agustina Trevino] *could* perform light duty, but could not

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Levi's own absence policy, which contemplated the return of post-90 day absentees to positions of employment *other* than their former jobs, together with its admissions that it refused Agustina Trevino re-employment solely because she could not perform "the essential functions of her *former* job" and that it did not know whether other work was available, **raised a fact issue as to whether Levi violated its own absence policy in refusing to return her to a position other than her former job.**

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It yet again revealed that Levi had, contrary to company policy, gotten angry when Trevino's doctor's excuse came from a general practitioner rather than a specialist, CRR 692, and that its office personnel repeatedly had made rude faces and sarcastic comments to Trevino when she went to the office for reasons related to her injury. CRR 714-717, Cf. Ramos Depo. at pp. 67-68.

Again, moreover, despite the fact that it was Levi's policy to look for light duty positions, Ramos Depo., pp. 21-22, 93;

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[6] (...continued)
such meetings were unsuccessful. CRR 390, 491, 602, 1702, 1718.

Valdez Depo., pp. 7-8; Martinez Depo., p. 22, **it also failed to do so on behalf of Plaintiff Trevino**. Ramos Depo., p. 75; Valdez Depo., pp. 24-25.